Supreme Court, U. S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979

No. 79-219

EDWARD O. LAMB, *et al.*,
Petitioners,

vs.

RUSSELL MORTON BROWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS FOR THE SIXTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a writ of certiorari may issue to review a ruling, the law of which, because of a previous election not to seek review in this Court, had become the final and established law of the case?

2. Whether a judgment entered for the defendant on the basis of the forum's statute of limitations is denied Full Faith and Credit when the same claim for relief is about to be heard in another forum where the statute of limitations has not run?

STATEMENT OF THE CASE

On April 28, 1959, Russell Morton Brown filed this action against Edward G. Lamb and others. The action is for attorney's fees which Brown claims for services rendered over the five (5) year period from 1953 through 1957. Brown had represented Lamb in proceedings before the Federal Communications Commission that were prompted by Lamb's alleged affiliation with the Communist Party.

A Motion to Strike the petition was granted, but the Court of Appeals reversed. The Supreme Court of Ohio declined review, and the case was remanded to the trial court for further proceedings.

On May 21, 1963, because the action had sat idle in the Common Pleas Court for almost four years, Brown filed a second action in the United States District Court for the District of Columbia demanding judgment for the same attorney's fees that are the subject matter of the Ohio action. The District of Columbia suit proceeded to trial. The jury returned a verdict for Brown in the amount of Four Hundred Thousand Dollars ($400,000.00). The District Court, however, granted a defense Motion for Judgment n.o.v. on the ground that the District of Columbia action had not been filed within the District of Columbia's three year statute of limitations. Brown appealed, but the United States Court of Appeals for the District of Columbia affirmed the judgment n.o.v. suggesting that Brown pursue his Ohio action. *Brown v. Lamb,* 414 F.2d 1210, 1212 (D.C. Cir. 1969). The Supreme Court of the United States denied certiorari. *Brown v. Lamb,* 397 U.S. 907 (1970).

While the District of Columbia action was pending, the Ohio suit was inadvertently dismissed for want of

prosecution. Upon Brown's motion the erroneous dismissal was remedied, and the case was returned to the active list. When the defense moved for reconsideration of the reinstatement, the trial judge ruled that the petition had properly been dismissed because the District of Columbia judgment n.o.v. was res judicata on the claims pending in Ohio. *Brown v. Lamb,* 36 Ohio St. 2d 8, 10 (1973). The trial judge, therefore, again dismissed the petition. Brown again appealed that Order to the Court of Appeals, but the judgment of dismissal was affirmed. The Supreme Court of Ohio, however, reversed the dismissal saying that the dismissal was an "erroneous denial of a day in court to the appellant." *Brown v. Lamb, supra* at 8. The case was once again remanded to the trial court for further proceedings. Upon remand, Brown filed an Amended Complaint, joining additional parties. Lamb filed an Answer to the Amended Complaint.

Lamb then filed an action in the United States District Court for the Northern District of Ohio seeking to enjoin further proceedings in the common pleas court. The action, brought against various court officials as well as against Brown, complained that further prosecution of the state action would deny the constitutionally guaranteed full faith and credit to be given to the District of Columbia judgment. The district court issued a permanent injunction against further proceedings in the Common Pleas Court. *Lamb Enterprises, Inc., et al. v. Kiroff, et al.,* 399 F. Supp. 409 (N.D. Ohio 1975). The United States Court of Appeals for the Sixth Circuit reversed. *Lamb Enterprises, Inc., et al. v. Kiroff, et al.,* 549 F.2d 1052 (6th Cir. 1977). The Supreme Court of the United States denied certiorari on June 13, 1977. *Lamb Enterprises, Inc., et al. v. Kiroff, et al.,* 431 U.S. 968 (1977).

After the federal injunction against further proceedings in the state court was vacated, Lamb filed an Amended

Answer to Brown's Amended Complaint on July 18, 1977. The Amended Answer asserted a counterclaim for declaratory judgment on the question of whether the judgment n.o.v. in the District of Columbia bars plaintiff's contract claim. Defendant moved for summary judgment on the counterclaim. The trial court denied the motion. The Court of Appeals of Lucas County, Ohio dismissed the appeal, and the Supreme Court of Ohio likewise dismissed. Petitioners have sought a writ of certiorari to review the various decisions dismissing the appeals.

In the entire time this controversy has been pending Brown has not had a final adjudication on the merits of his claim against Brown et al. *See Brown v. Lamb,* 414 F.2d 1210, 1212 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 907 (1970); *Brown v. Lamb,* 10 Ohio St. 2d 8 (1973).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Law of This Case Has Already Been Established With Finality.

The trial court order which ultimately precipitated the Petition for Certiorari was an order denying defendants' motion for summary judgment urged on the basis of the District of Columbia's judgment n.o.v. in their favor. Petitioners raise the issue of the res judicata/full faith and credit effect to be given that D.C. judgment.

As the trial court below observed in ruling upon the motion for summary judgment, the defendants had raised this very same issue before, specifically in the 1973 appeal to the Supreme Court of Ohio. Aug. 25, 1976 Opinion of Common Pleas Court, Petitioners' Appendix at A17. The Supreme Court of Ohio ruled on that question. *Brown*

v. Lamb, 10 Ohio St. 2d 8 (1973). Petitioner elected not to seek review of the federal constitutional issue in this Court at that time. The trial court below concluded, and this Court in the past has held that an election not to pursue the federal claim to this Court conclusively rendered the highest state court's decision the law of the case. *Brownell v. Chase National Bank,* 352 U.S. 36 (1956); *Angel v. Bullington,* 330 U.S. 183 (1947).

2. The Legal Premise for the Supposed Constitutional Violation Does Not Exist Because the Judgment of the District of Columbia Was Not on the Merits.

Under the full faith and credit clause of the Constitution of the United States, a judgment need be given as much credit as it is given in the forum where the original judgment is rendered. *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 439 (1943). Conversely, no greater effect need be given a judgment than is given it in the jurisdiction where it was rendered. *Board of Public Works v. Columbia College,* 84 U.S. (17 Wall.) 521 (1873); *Robertson v. Pickrell,* 109 U.S. 608, 610-11 (1883).

The District of Columbia judgment, which Lamb once again insists is a bar in this case, was entered on the ground that the action filed in the District of Columbia was commenced after expiration of the District of Columbia's three year statute of limitations. *Brown v. Lamb,* 414 F.2d 1210, 1211 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 907 (1970). The question of what effect is to be given a judgment such as that is a matter of local law. *See Durfee v. Duke,* 375 U.S. 106, 109-11 (1963); *cf., Chevron Oil Co. v. Huson,* 404 U.S. 97, 111-12 n.2 (1971) (Douglas J., concurring); *Angel v. Bullington,* 330 U.S. 183, 190-91 (1947); *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4, 8 (1939). This includes the effect to

be given to a judgment rendered on the basis of the statute of limitations of the jurisdiction. *Bell v. Morrison,* 26 U.S. (1 Pet.) 265 (1828). In the District of Columbia, "[t]he statute of limitations operates to extinguish the remedy, . . . but it does not extinguish [the] right." *Cafritz v. Koslow,* 167 F.2d 749, 751 (D.C. Cir. 1948). *See also Talbott v. Hill,* 261 F. 244 (D.C. Cir. 1919); *Paul v. District of Columbia,* 47 App. D.C. 552 (D.C. Cir. 1918); *cf., Universal Airlines v. Eastern Airlines,* 188 F.2d 993, 996 (D.C. Cir. 1951). As a result, the running of the statute of limitations in the District of Columbia does not bar an action on the same claim in another jurisdiction where the statute of limitations has not run. *Hartman v. Time, Inc.,* 166 F.2d 127, 138-39 (3rd Cir. 1948). *Accord, Fricks v. Carroll,* 368 F.2d 329 (5th Cir. 1966). *See generally, Brown v. Lamb,* 414 F.2d 1210 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 907 (1970); *Brown v. Lamb,* 36 Ohio St. 2d 8 (1973); *see also, Sack v. Low,* 478 F.2d 360, 363-64 (2d Cir. 1973); *Collins v. Nurre,* 20 Ohio App. 2d 53, 54 (1969).

Quite simply, the District of Columbia judgment n.o.v., based as it was on the District of Columbia statute of limitations, is a judgment extinguishing only the remedy available to the plaintiff in the District of Columbia. The judgment does not extinguish the underlying cause of action and thus does not affect its actionability elsewhere. *See generally,* RESTATEMENT OF JUDGMENTS §49, Comment a at 194-95 (1942):

> A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case, the judgment is on the merits to the extent that it will bar the plaintiff from maintaining the merits so far as actions in other states are concerned. Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. *He is not, however, precluded from maintaining an action to enforce the claim in another state if it is not barred by the Statute of Limitations in that State.*

(Emphasis added).

Because Respondent Brown's claim for relief survives the District of Columbia judgment, that judgment does not operate to bar further proceedings in this case.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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